A

CHIN PEI LEE

v.

YAP KIN CHOONG

B

HIGH COURT MALAYA, KUALA LUMPUR
SURAYA OTHMAN J
[ORIGINATING SUMMONS NO: S8-24-94-2008]
27 OCTOBER 2009

C ***FAMILY LAW:*** *Divorce - Petition - Application by wife for exemption from requirement of referring matrimonial difficulty to a conciliatory body - Whether husband suffering from an incurable mental illness - Law Reform (Marriage and Divorce) Act 1976, s. 106(1)(v)*

D This was an application by the plaintiff by way of originating summons for, *inter alia*, an order exempting the requirement to refer her matrimonial difficulty to a conciliatory body (Marriage Tribunal) for reconciliation prior to filing for divorce. This requirement is governed by s. 106 of the Law Reform (Marriage and Divorce) Act 1976 ('Act'), and the main issue requiring determination in this E case was whether the defendant was suffering from an incurable mental illness, thereby exempting the plaintiff from referring her matrimonial difficulty to a conciliatory body under s. 106(1)(v) of the Act.

F **Held (dismissing the plaintiff's originating summons):**

(1) It was clear the exception could only be invoked if the plaintiff could show that the defendant was suffering from an incurable mental illness. However, there were neither any clear cases G submitted by the plaintiff exactly explaining the meaning of "incurable mental illness" nor any concrete evidence from medical reports to show any mental impediment suffered by the defendant as required by s. 106(1)(v) of the Act. Thus, there was no positive evidence to show that the defendant suffered H from an incurable mental illness. The plaintiff could not simply seek an exemption from referring her matrimonial difficulty to a marriage tribunal just because she did not desire reconciliation. This reason was not justified and if accepted would open the floodgates to abuse by any party treating I marriage and divorce as a trivial matter that can be dealt with

easily. In conclusion, it was clear that in this case the plaintiff had not satisfied the exception under s. 106(1)(v) of the Act. (paras 14, 15, 16 & 17)

Case(s) referred to:
Bowman v. Bowman [1949] 2 All ER 127 ***(refd)***
Joseph Jeganathan v. Rosaline Joseph [1989] 2 CLJ 616; [1989] 1 CLJ (Rep) 645 HC ***(refd)***
C v. A [1998] 4 CLJ 38 HC ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 53, 57(2), 106(1)(v)

For the plaintiff - Miss Kokilah; M/s David Gurupatham & Koay
For the defendant - KL Mah; M/s KS Su & Mah

Reported by Suresh Nathan

JUDGMENT

Suraya Othman J:

Introduction

[1] The plaintiff in her originating summons (encl. 1) applied to this court for an order to exempt the requirement to refer her matrimonial difficulty to a Conciliatory Body (Marriage Tribunal) for reconciliation prior to filing for divorce. This requirement is governed by s. 106 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) ("LRA 1976").

[2] The details of the plaintiff's application prayed for are as follows:

(1) the plaintiff is exempted from referring her matrimonial difficulty to a Conciliatory Body under s. 106 of the LRA 1976;

(2) the plaintiff is allowed to file a divorce petition under s. 53 of the LRA 1976 without a certificate from the Conciliatory Body;

(3) cost in a cause; and

(4) other further reliefs the court deems fit.

A

Facts And Background

[3] The plaintiff in this case was married to the defendant at Tokong Cina Hong San on 30 October 1997. In 1998, the defendant attended a course in Bali, Indonesia. On his return to
B Malaysia he fell ill and stopped working. In the second half of the year 1998, the defendant was seen by an American Psychologist, one Dr. Loy, in Kuala Lumpur. On Dr. Loy's recommendation, the defendant decided to go to the United States of America to seek further medical or alternative treatment. In late 1998, the plaintiff
C took leave from her job and accompanied the defendant to the United States of America for the said purpose. While they were there, the plaintiff resigned from her job. At the end of 1999, the plaintiff and defendant returned to Malaysia. When the defendant's condition improved the plaintiff started working part time at
D Mercury Paints Factory Sdn Bhd in Batu Caves, Selangor. In the year 2000 the plaintiff and defendant moved to Country Heights Resort in Kajang. On 27 February 2006 the plaintiff left the defendant's house without taking anything except her personal effects and belongings. The defendant continued living at the said
E house and the plaintiff lived separately at Taman Tun Dr. Ismail, Kuala Lumpur. Plaintiff did not return to the defendant since.

Principles Of Law

[4] The requirement for reference of a marriage to a Marriage
F Tribunal before any person can file for a divorce petition is governed by s. 106 of the LRA 1976. Section 106 specifically makes the requirement mandatory unless the plaintiff can satisfy the provisos stated below:

G **106. Requirement of reference to conciliatory body before petition for divorce.**

(1) No person shall petition for divorce, except under sections 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed
H to reconcile the parties:

Provided that this requirement shall not apply in any case:

(i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse;

I

(ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;

(iii) where the respondent has been required to appear before a conciliatory body and has wilfully failed to attend;

(iv) where the respondent is imprisoned for a term of five years or more;

(v) **where the petitioner alleged that the respondent is suffering from an incurable mental illness; or**

(vi) where the court is satisfied that there are exceptional circumstances which makes reference to a conciliatory body impracticable.

[5] The court would only grant a dissolution of a marriage after being satisfied that all efforts at reconciliation had been unsuccessful. In fact reconciliation attempts are essential prior to any petition for divorce as clearly enunciated in s. 57(2) of the LRA 1976. Section 57(2) clearly states that every petition for a divorce shall state what steps had been taken to effect a reconciliation.

Issue To Be Decided

[6] From the affidavits filed by the plaintiff and the defendant concerned, the main issue to be considered by this court is:

> Whether the defendant is suffering from an incurable mental illness, thereby exempting the plaintiff from referring her matrimonial difficulty to a Conciliatory Body under section 106(1)(v) of the LRA 1976.

[7] Counsel for the plaintiff submitted that the defendant sought medical assistance locally at several private medical institutions and all the doctors were unable to diagnose his illness or prescribe a cure. Generally all the doctors were of the view that the defendant suffered either from chronic depression or chronic mental disorder. Counsel for the plaintiff also submitted that the "illness" of the defendant which are continuing to date has caused extreme hardship to the plaintiff. Plaintiff has no documents to support her contention that the defendant is mentally ill but asserts that her marriage to the defendant has broken down irretrievably and is beyond reconciliation due to his illness.

A **[8]** Plaintiff's counsel submitted the case of *Bowman v. Bowman* [1949] 2 All ER 127 CA where the court held that the really important consideration was to see whether there was any chance of a reconciliation. On this point it held that it was material for the court to enquire what the applicant had already done to try and
B make the marriage a success or to become reconciled.

[9] Plaintiff's counsel also submitted another case, *C v. A* [1998] 4 CLJ 38. In this case the court stated that "it is obvious that the purpose and intent of s. 106 is to reconcile parties where there is a
C reasonable probability of reconciliation."

[10] Plaintiff's counsel further submitted that the plaintiff had made sincere attempts to save her marriage but the defendant's behaviour due to his mental illness has made it unreasonable for her to live with him.
D

[11] On the other hand counsel for the defendant referred to the following case; *Joseph Jeganathan v. Rosaline Joseph* [1989] 2 CLJ 616; [1989] 1 CLJ (Rep) 645; *C v. A* and *Bowman v. Bowman (supra)* and submitted that the operative word "shall" in s. 106 of
E the LRA 1976 makes the reconciliatory requirement mandatory. He further submitted that the requirement for reconciliation attempts is implemented as a safeguard to preserve the sanctity of marriage and this requirement must never be waived unless under exceptional circumstances.
F

[12] Counsel for the defendant also submitted that the defendant is suffering from a physical ailment and not a mental ailment as required under the proviso of s. 106.

G **Finding Of The Court**

[13] It is important to observe that the purpose for the introduction of s. 106 in the LRA 1976 is to encourage reconciliation. This purpose is clearly established in the Report of the Royal Commission on Non-Muslim Marriage and Divorce dated
H 15 November 1971. This Royal Commission was set up before the amendment of the Act to look into various issues relating to the marriage and divorce laws for non-Muslims.

[14] It is clear that the exceptions for the requirement to refer to
I a marriage tribunal can only be invoked if the plaintiff can show that the defendant is suffering from an incurable mental illness.

Thus, it is the duty of the plaintiff's counsel to establish the fact that the illness is an incurable mental illness. As can be seen there is neither any clear cases submitted by the plaintiff's counsel that exactly explained the meaning of incurable mental illness nor any concrete evidence from medical reports to show any mental impediment suffered by the defendant as required by s. 106(1)(v) of the Act. Therefore, in answering the question whether the defendant is suffering from an incurable mental illness or not, this court is of the opinion that there is no positive evidence to show that the defendant is suffering from an incurable mental illness.

[15] Therefore, this court agrees with counsel for the defendant that the plaintiff cannot simply seek an exemption from referring her matrimonial difficulty to a marriage tribunal just because she does not desire reconciliation. This reason is not justified and if accepted by this court, would open the floodgates to abuse by any party treating marriage and divorce as a trivial matter that can be dealt with easily.

Conclusion

[16] After considering all the relevant cases and submissions of both parties this court is satisfied that the affidavit affirmed by the plaintiff are unable to show that the defendant has suffered or is suffering from an incurable mental illness as required under s. 106(1)(v) of the LRA 1976. Thus, the answer to the main issue is in the negative.

Order

[17] In this case it is clear that the plaintiff had not satisfied the exception under s. 106(1)(v) of the LRA 1976. Therefore, the plaintiff's originating summons is dismissed. Costs in the cause.

Order accordingly.